WONG LEH YIN

v.

PP

HIGH COURT SABAH & SARAWAK, SIBU
LINTON ALBERT J
[CRIMINAL APPLICATION NO: 44-1-2007]
16 MARCH 2007

CRIMINAL PROCEDURE: *Bail - Granting of - Application to admit applicant to bail - Whether applicant provided special or exceptional reasons for granting bail - Requisite consent of public prosecutor yet to be obtained to charge applicant - Whether s. 177A Criminal Procedure Code transformed applicant into 'a person other than a person accused of non-bailable offence' under s. 387 Criminal Procedure Code - Whether proposition advanced on behalf of applicant untenable - Whether bail accordingly refused*

The applicant was arrested and upon the expiry of the remand tentatively charged before the Magistrate's Court for an offence under s. 364 read with s. 109 of the Penal Code. The application to admit the applicant to bail pending the requisite consent to prosecute was made under ss. 388 and 389 of the Criminal Procedure Code. The deputy public prosecutor, in opposing the application, filed an affidavit affirmed by a police officer holding the rank of Inspector who was also the investigating officer in this case which contained reasonable grounds for believing that the applicant had been guilty of abetment in the commission of the offence of abduction. The applicant, however, argued that on the effect of s. 177A of the Criminal Procedure Code (CPC) to the instant application where the requisite consent of the public prosecutor had not been obtained, s. 388 did not apply because the applicant could not be said to have been charged with any offence. It followed therefore that s. 387 of the CPC applied and the applicant was entitled to bail as of right.

Held (dismissing the application and refusing bail):

(1) The matters deposed to by the investigating officer relating to the guilt of the applicant was not contradicted. The applicant merely deposed to the fact that he was out of the country for the greater part of the period during which the applicant was alleged to have committed the offence. That did not negate

A the guilt of the applicant because the offence of abetment does not involve the actual commission of the crime abetted. Also, the grounds set out in the applicant's affidavit merely constituted matters that would arise consequent upon the granting of bail. The willingness of the applicant to undertake
B not to tamper with witnesses or interfere with the investigation, nor his submission to restrictions imposed on his movements and surrender of his passport constitute special or exceptional reasons for granting bail. Further, the alleged good character of the applicant by virtue of being director of many
C companies vouched by a titled and prominent politician cum businessman was inconsequential. Based on the uncontradicted matters which were deposed to in the affidavit filed by the deputy public prosecutor, it was conceivable that the applicant would, if released on bail, pervert the course of justice, in all
D its violent forms and that by itself, militated against the grant of bail. (paras 5 & 6)

(2) It could not conceivably be said that just because the consent had yet to be obtained to charge the applicant, s. 177A of
E the CPC transformed the applicant into a 'person other than a person accused of a non-bailable offence' under s. 387 of the CPC. The proviso to s. 177A clearly provides for the applicant to be remanded in custody notwithstanding the consent had not been obtained. The proposition advanced on
F behalf of the applicant was so ridiculously untenable that taken to its logical conclusion it would mean that persons charged with the most heinous of crimes like murder and drug trafficking would be lurking, if they were entitled as of right to the grant of bail pending the requisite consent to prosecute.
G The application, for the reasons and in the circumstances aforesaid, was dismissed and bail was accordingly refused. (paras 8 & 9)

Case(s) referred to:

Che Su Daud v. PP [1978] 2 MLJ 162 ***(refd)***
H *Lim Guan Eng v. PP [1998] 3 CLJ 769 CA* ***(refd)***
PP v. Dato' Balwant Singh [2002] 4 CLJ 155 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [1998] 4 CLJ 387 HC ***(refd)***

Legislation referred to:

I Criminal Procedure Code, ss. 177A, 387, 388, 389
Penal Code, ss. 109, 364, 388

Other source(s) referred to:
Ratanlal – Law Of Crimes, 24th edn, p 397

For the applicant - Orlando Chua (Jacob Wong with him); M/s Wong, Orlando Chua & Kuok
For the prosecution - Ahmad Zubir Jantan, DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] The applicant Wong Leh Yin was arrested on 2 March 2007 and upon the expiry of the remand on 8 March 2007, he was tentatively charged before the Magistrates' Court for an offence under s. 364 read with s. 109 of the Penal Code. The charge read as follows:

> That you, between 6th February, 2007 at 7.30 p.m. and 24th February at 1.00 p.m. at No. 7A, Jalan Sawi, in the District of Sibu in the State of Sarawak, abetted the commission of the offence of the abduction on one Kueh Chiow Huat (KPT: 770909-13-5937) committed by one Wee Teck Hong and 3 others in order that such person may be so disposed of as to be put in danger of being murdered, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under Section 364 of the Penal Code, read with section 109 of the same Code.

[2] The offence is by virtue of s. 109 of the Penal Code punishable by death or imprisonment for a term, which may extend to twenty years plus whipping. The construction of s. 364 of the Penal Code was such that the death penalty is the first option of punishment for an offender (see *Lim Guam Eng v. Public Prosecutor* [1998] 3 CLJ 769). It is common ground that the offence is non-bailable and unarguably a very serious one. Hence, the application to admit the applicant to bail pending the requisite consent to prosecute is made under ss. 388 and 389 of the Criminal Procedure Code. The statement of the law on this is set out in the judgment of Gunn Chit Tuan, J in *Che Su binti Daud v. Public Prosecutor* [1978] 2 MLJ 162, an authority which has withstood the test of time:

> Though a judge has under sections 388 and 389 of the Criminal Procedure Code (F.M.S. Cap. 6) absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused has been guilty of an offence punishable with death or life imprisonment ... What constitutes exceptional and special reasons must necessarily depend on the facts of each case ... (at page 162)

[3] At this early stage the prosecution is neither expected nor required to adduce evidence sufficient to satisfy the standard of proof required to establish the guilt of the applicant at the trial. All that is needed, in my view, is some evidence that supports a finding consistent with the operative words of sub-section (1) of s. 388 of the Penal Code which are these: "... if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life".

[4] The learned DPP, in opposing the application has filed an affidavit affirmed by one Mustafa bin Yaacob, a police officer holding the rank of Inspector who is also the investigating officer in this case who deposed to the following material facts at para 5 of his affidavit, which are within his personal knowledge and based on records to which he has access:

> ... I verily believe that the Applicant has abetted in the commission of the crime committed by the principal offender together with the others. I further aver that there is a witness/ victim to testify that the Applicant has instigated the offence committed by the principal offender. The statement from the victim would show the Applicant abetted the offence committed by the principal offender.

From that it appears to me to be reasonable grounds for believing that the applicant has been guilty of abetment in the commission of the offence of abduction. In *PP v. Dato' Balwant Singh* [2002] 4 CLJ 155 at p 165, this is what Augustine Paul, J (as he then was) said:

> Accordingly, I advised the prosecution that something in the nature of an opening address may suffice. This must, of course, refer to the evidence to be adduced in support of the assertions made in the statement. This will be sufficient for the court to ascertain whether the prosecution will be able to produce *prima facie* evidence in support of the charge. As the section speaks only of the existence of reasonable grounds and not evidence there is

no requirement to analyze the evidence that is to be tendered. The Court must apply its mind to the materials made available. This process will preclude a detailed examination of the evidence to avoid any form of prejudice to either party.

[5] It is significant that the matters deposed to by the investigating officer relating to the guilt of the applicant is not contradicted. Mr. Jacob Wong, junior counsel for the applicant merely deposed to the fact that the applicant was out of the country for the greater part of the period during which the applicant is alleged to have committed the offence. That does not negate the guilt of the applicant because it is trite that the offence of abetment does not involve the actual commission of the crime abetted (see *Ratanlal – Law Of Crimes,* 24th edn at p 397).

[6] The grounds set out in the affidavit of Mr. Jacob Wong merely constitute matters that would arise consequent upon the granting of bail. The willingness of the applicant to undertake not to tamper with witnesses or interfere with the investigation, nor his submission to restrictions imposed on his movements and surrender of his passport constitute special or exceptional reasons for granting bail. The alleged good character of the applicant by virtue of being director of many companies vouched for by a titled and prominent politician cum businessman one Dato' Lau Cheng Kiong and another businessman cum social worker and community leader one Khiu Siong Hii, is inconsequential (see *Public Prosecutor v. Dato' Seri Anwar Ibrahim* [1998] 4 CLJ 387). If at all character is relevant, it is this: the applicant is an underworld figure, the leader of the "Wah Kee" triad nicknamed "Lee Long". He was is detained under the Emergency Ordinance 1969 at the Rehabilitation Centre, Simpang Renggam in 2001 and placed under restricted residence in Marudi in 2003, grounded on the applicant's involvement in 1999 in abducting a victim to a Chinese cemetery where the victim was severely beaten and robbed and subsequently while being treated for his injuries in hospital, threatened not to cooperate with the police in the investigation and in 2002 severely beating up and extorting a victim of RM100,000 for dating the applicant's girlfriend who worked at the "Appollo Karaoke". These matters which are deposed to in the affidavit filed on behalf of the DPP are also not contradicted. It is conceivable that the applicant would, if released on bail, pervert the course of justice, in all its violent forms and that by itself, militates against the grant of bail.

[7] One final aspect of the argument advanced on behalf of applicant is premised on the effect of s. 177A of the Criminal Procedure Code (CPC) to the instant application where the requisite consent of the Public Prosecutor had not been obtained and therefore, s. 388 does not apply because the applicant cannot be said to have been charged with any offence. It follows, therefore, so the argument goes, s. 387 of the CPC applies and the applicant is entitled to bail as of right. Section 177A of the CPC provides as follow:

> (1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.
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> (2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before such Court as soon as may be practical:
>
> Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.
>
> (3) When the accused appears or is brought the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

and s. 387 of the CPC is as follows:

> (i) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of Corporal or by such Court.

(ii) Such police officer or such Court, if he or it thinks fit, may instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

[8] With respect that argument is a convoluted interpretation of s. 177A of the CPC, because devoid of authority, it cannot conceivably be said that just because the consent has yet to be obtained to charge the applicant, s. 177A of the CPC transforms the applicant into a "person other than a person accused of a non-bailable offence" under s. 387 of the CPC. The proviso to s. 177A clearly provides for the applicant to be remanded in custody notwithstanding the consent has not been obtained. The proposition advanced on behalf of the applicant is so ridiculously untenable that taken to its logical conclusion it would mean that persons charged with the most heinous of crimes like murder and drug trafficking would be lurking in our midst, if they are entitled as of right to the grant of bail pending the requisite consent to prosecute.

[9] The application is for the reasons and in the circumstances aforesaid dismissed and bail is accordingly refused. Order accordingly.